Supreme Court, U.S.
FILED
OCT 7 - 2004
OFFICE OF THE CLERK

20

No. 02-1672

In the

Supreme Court of the United States

RODERICK JACKSON,
Petitioner,

v.

BIRMINGHAM BOARD OF EDUCATION,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

BRIEF OF THE STATES OF ALABAMA, DELAWARE, HAWAII, NEVADA, OREGON, SOUTH DAKOTA, TENNESSEE, UTAH, AND VIRGINIA AS AMICI CURIAE IN SUPPORT OF RESPONDENT

Troy King
Attorney General

Kevin C. Newsom
Solicitor General
Counsel of Record

STATE OF ALABAMA
Office of the Attorney General
11 South Union Street
Montgomery, Alabama 36130
(334) 242-7401

October 7, 2004

(Additional counsel for amici curiae are listed inside the front cover.)

M. JANE BRADY
ATTORNEY GENERAL
STATE OF DELAWARE
820 N. French St.
Wilmington, DE 19810

MARK J. BENNETT
ATTORNEY GENERAL
STATE OF HAWAII
425 Queen Street
Honolulu, Hawaii 96813

BRIAN SANDOVAL
ATTORNEY GENERAL
STATE OF NEVADA
100 N. Carson Street
Carson City, NV 89701

HARDY MYERS
ATTORNEY GENERAL
STATE OF OREGON
1162 Court Street N.E.
Salem, Oregon 97301

LAWRENCE E. LONG
ATTORNEY GENERAL
STATE OF SOUTH DAKOTA
500 E. Capitol
Pierre, SD 57501-5070

PAUL G. SUMMERS
ATTORNEY GENERAL
STATE OF TENNESSEE
P.O. Box 20207
Nashville, TN 37202-0207

MARK L. SHURTLEFF
ATTORNEY GENERAL
STATE OF UTAH
236 State Capitol
Salt Lake City, Utah 84114

JERRY W. KILGORE
ATTORNEY GENERAL
COMMONWEALTH OF
VIRGINIA
900 East Main Street
Richmond, VA 23219

QUESTION PRESENTED

Whether the private right of action for violations of Title IX of the Education Amendments Act of 1972, 20 U.S.C. §§1681 *et seq.*, encompasses redress for retaliation for complaints about unlawful sex discrimination.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF AMICI 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. The Issue Is Whether Congress Actually Intended To Provide A Private Remedy For Retaliation, Not Just Whether Title IX Can Plausibly Be Construed To Prohibit Retaliation. 3

II. Jackson Has Not Shown A Clear Congressional Intent To Prohibit Retaliation, Let Alone To Create A Private Remedy For Retaliation. 7

A. Title IX's Text Does Not Reflect A Clear Congressional Intent To Reach Or Remedy Retaliation. 7

B. Statutory Structure Does Not Indicate A Clear Congressional Intent To Reach Or Remedy Retaliation. 10

C. The "Context" Surrounding Title IX's Enactment Does Not Suggest A Clear Congressional Intent To Reach Or Remedy Retaliation. 14

D. The Administrative Regulation That Jackson Invokes Cannot Be Read To Create A Private Remedy For Retaliation 20

III. Jackson's Reliance On Title IX's Perceived "Purposes" And "Policies" Is Misplaced. 25

IV. Any Extension Of A Private Remedy Beyond Direct Victims Would Impermissibly Expand The "Special Class" For Whose Benefit Title IX Was Enacted 28

CONCLUSION 30

TABLE OF AUTHORITIES

Cases

Alexander v. Choate, 469 U.S. 287 (1985) 24

Alexander v. Sandoval, 532 U.S. 275 (2001) ..... passim

Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985) 30

Barnes v. Gorman, 536 U.S. 181 (2002) 6

Barrows v. Jackson, 346 U.S. 249 (1953) 17

Bazemore v. Friday, 478 U.S. 385 (1986) 24

California v. Sierra Club, 451 U.S. 287 (1981) 26, 29

Cannon v. University of Chicago, 441 U.S. 677 (1979) ..... passim

Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164 (1994) ..... passim

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 24

Cohen v. Brown Univ., 101 F.3d 155 (1st Cir. 1996) 12

Cort v. Ash, 422 U.S. 66 (1975) 28

Davis v. Monroe County Bd. of Educ., 526 U.S. 629 (1999) 4, 6

Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976) 10

Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60 (1992) 6

Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998) 5, 6, 27

General Motors Corp. v. Tracy, 519 U.S. 278 (1997) 8

Great Am. Fed. Sav. & Loan Ass'n v. Novotny, 442 U.S. 366 (1979) 9

Grove City Coll. v. Bell, 465 U.S. 555 (1984), *superseded in part by statute*, 20 U.S.C. §1687 ..... 14, 30

Guardian Industries Corp. v. NLRB, 49 F.3d 317 (7th Cir. 1995) 8

J.I. Case Co. v. Borak, 377 U.S. 426 (1964) 5, 25

Lau v. Nichols, 414 U.S. 563 (1974) 24

Lenard v. Argento, 808 F.2d 1242 (7th Cir. 1987) 9

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353 (1982) 28

Moses v. Washington Parish Sch. Bd., 276 F. Supp. 834 (D. La. 1967) 19

Musick, Peeler & Garrett v. Employers Ins. of Wassau, 508 U.S. 286 (1993) 26

Nationsbank of N.C., N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251 (1995) 24

NCAA v. Smith, 525 U.S. 459 (1999) 24

North Haven Bd. of Educ. v. Bell, 456 U.S. 512 (1982) 9, 14

Olmstead v. Zimring, 527 U.S. 581 (1999) 8

Pennhurst State Sch. and Hosp. v. Halderman, 451 U.S. 1 (1981) 5, 6

Russello v. United States, 464 U.S. 16 (1983) 12

School Bd. of Nassau County v. Arline, 480 U.S. 273 (1987) 24

Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969) 2, 16, 17, 18

Texas & Pac. R. Co. v. Rigsby, 241 U.S. 33 (1916) 29

Thompson v. Thompson, 484 U.S. 174 (1988) 26

Touche Ross & Co. v. Reddington, 442 U.S. 560 (1979) ... 5, 20, 28

Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979) 5, 11, 26

United States v. Jefferson County Bd. of Educ., 380 F.2d 385 (5th Cir. 1967) (en banc) 19

United States v. Medical Soc'y of S.C., 298 F. Supp. 145 (D.S.C. 1969) 19

Virginia Bankshares, Inc. v. Sandberg, 501 U.S. 1083 (1991) 4, 5

Statutes and Regulations

Education Amendments of 1972, Tit. IX, 20 U.S.C. §1681 *et seq.* ..... passim

Section 901, 20 U.S.C. §1681 ..... 7, 10, 12, 14, 21, 22, 23, 26

Section 902, 20 U.S.C. §1682 ..... 14, 22, 27

Civil Rights Act of 1964, Tit. VI, 42 U.S.C. §2000d *et seq.* ..... passim

Section 601, 42 U.S.C. §2000d 21, 22

Section 602, 42 U.S.C. §2000d-1 22

Civil Rights Act of 1964, Tit. VII, 42 U.S.C. §2000e *et seq.* 2, 10, 11, 12, 13

42 U.S.C. §2000e-2 ..... 10, 11, 12, 13

42 U.S.C. §2000e-3(a) 10, 13

38 U.S.C. §516(d) 13

42 U.S.C. §1982 ..... 16, 18

42 U.S.C. §1988 6

42 U.S.C. §2000d-7 ..... 1, 30

44 U.S.C. §3507(e)(3)(B) 13

Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988) 30

The Notification and Federal Employee Anti-discrimination and Retaliation Act of 2002, Pub. L. 107-174, 116 Stat. 566 (2002) 13

28 C.F.R. §42.104 24
34 C.F.R. §100.3 23
34 C.F.R. §100.6 ..... 22, 23
34 C.F.R. §100.7(a)-(d) 22
34 C.F.R. §100.7(e) ..... passim
34 C.F.R. §100.8 23
34 C.F.R. §100.9 23
34 C.F.R. §100.10 23
34 C.F.R. §100.11 23
34 C.F.R. §100.13 23
34 C.F.R. §101.1 23
34 C.F.R. §106.2 23
34 C.F.R. §106.3 27
34 C.F.R. §106.21 23
34 C.F.R. §106.31 23
34 C.F.R. §106.37 23
34 C.F.R. §106.51 23
34 C.F.R. §106.71 ..... 21, 22, 23, 27

Other Authorities

H.R. Rep. No. 92-554, *reprinted in* 1972 U.S.C.C.A.N. 2462 (Oct. 8, 1971) 16
S. Rep. 107-143 (Apr. 15, 2002) 13
117 Cong. Rec. 30403 (Aug. 6, 1971) 16
117 Cong. Rec. 30407 (Aug. 6, 1971) 16, 29
117 Cong. Rec. 30408 (Aug, 6, 1971) 27
118 Cong. Rec. 5804 (Feb. 28, 1972) 16, 29

118 Cong. Rec. 5805 (Feb. 28, 1972) 16, 29
118 Cong. Rec. 5807 (Feb. 28, 1972) 16, 29
118 Cong. Rec. 5809 (Feb. 28, 1972) 16, 29
Discrimination Against Women: Hearings Before the Special Subcomm. on Education of the House Comm. on Educ. & Labor, 91st Cong., 2d Sess. (1970) 29
U.S. Department of Education Office of Civil Rights, Annual Report to Congress: Fiscal Years 2001 and 2002 (July 2003), www.ed.gov/about/offices/list/ocr/AnnRpt2002 27
Oxford English Dictionary (2d ed. 1989) 8
Black's Law Dictionary (7th ed. 1999) 7
Webster's Third New International Dictionary (1986) 8
Reed Dickerson, *Statutory Interpretation: Dipping Into Legislative History*, 11 Hofstra L. Rev. 1125 (1983) 15
John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 Sup. Ct. Rev. 223 (collecting cases) 15

INTEREST OF AMICI

Congress has expressly abrogated States' sovereign immunity from private claims brought under Title IX. *See* 42 U.S.C. §2000d-7(a). Accordingly, like the local school board at issue in this case, the amici States are subject to Title IX's prohibition on gender "discrimination" and are liable for any injunctive relief, monetary damages, and attorneys fees that may arise out of Title IX suits. As frequent defendants, the amici States have a strong interest in ensuring that the implied private right of action recognized in *Cannon v. University of Chicago*, 441 U.S. 677 (1979), is maintained within its intended boundaries and that the specific condition on the acceptance of federal funds imposed under Title IX – namely, that recipients not "discriminat[e]" on the basis of sex – is not casually extended to a new and different category of conduct.

SUMMARY OF ARGUMENT

1. Jackson's burden here is to prove that Congress actually, affirmatively, and clearly intended to create a private right of action for retaliation, not merely that Title IX can plausibly be construed to prohibit retaliation. This Court's cases make clear that a rigorous showing of congressional intent is required not only to demonstrate the existence of an implied private remedy as an initial matter, but also to justify its scope. Additionally, because Title IX is a Spending Clause statute, Jackson must show that the funding condition he seeks to enforce – a private remedy for retaliation – is stated "unambiguously" in the statute.

2. None of the traditional indicia of statutory meaning suggests an affirmative congressional intention to reach or remedy retaliation. *First*, Title IX's text does not mention retaliation; it refers only to "discrimination," which dictionaries and case law alike confirm is a comparative term. Jackson, of course, does not allege that he was disadvantaged in a comparative sense – *i.e.*, in relation to

someone else. *Second*, Jackson's position finds no support in statutory structure. Indeed, the most compelling piece of structural evidence – the fact that Title VII addresses retaliation both (i) expressly and (ii) separately from discrimination – cuts the other way. *Third*, there is nothing in the "context" surrounding Title IX's enactment – the legislative history, this Court's decision in *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969), or contemporary Title VI precedent – that evinces any affirmative congressional intention to reach retaliation. Among other problems, Jackson's contextual arguments all share a common failing in that they rest entirely on inferences from congressional silence. *Finally*, the administrative regulation on which Jackson relies, 34 C.F.R. §100.7(e), cannot support a private remedy for retaliation for the simple reason that it is not – and does not even purport to be – an "authoritative interpretation" of Title IX's ban on "discrimination."

3. Without any meaningful support in the text, structure, or context of Title IX itself – or, indeed, in the only Title IX regulation that even mentions retaliation – Jackson cannot prevail here on public-policy grounds. Initially, this Court's implied-right-of-action cases establish that arguments about a private remedy's "utility" or "desirability" are irrelevant; what matters is Congress' intent. Moreover, and contrary to Jackson's assertions, this case does not present a binary choice between (i) recognizing a private right of action for retaliation and (ii) leaving whistleblowers wholly unprotected. There remains the option of administrative enforcement – the remedy that Congress itself embraced when it enacted Title IX.

4. In any event, extension of Title IX's private remedy would be particularly inappropriate here. Jackson, a male basketball coach, does not himself claim to have been subjected to gender discrimination. Accordingly, he is not within the "special class" for whose benefit Title IX was enacted – namely, those persons (particularly women) who themselves have suffered direct gender discrimination.

ARGUMENT

The question here is whether, in the circumstances presented, Title IX entails a private right of action for retaliation. The sole criterion for answering that question is Congress' intent. None of the traditional indicia of statutory meaning – text, structure, legislative history, or even agency construction – suggests any affirmative intention to make retaliation privately actionable.

I. The Issue Is Whether Congress Actually Intended To Provide A Private Remedy For Retaliation, Not Just Whether Title IX Can Plausibly Be Construed To Prohibit Retaliation.

From the very outset, Jackson stakes his position on a particular premise – namely, that this case isn't really about whether Title IX entails a *private right of action for* retaliation but, instead, merely whether Title IX can be construed to *prohibit* retaliation. Pet. Br. 10-11. So long as Title IX can be read to prohibit retaliation, Jackson says, an implied private right of action to enforce that prohibition follows as a matter of course. And that, he claims, is because this Court recognized an implied right of action covering a Title IX claim in *Cannon v. University of Chicago*, 441 U.S. 677 (1979).

Jackson's strategy in pitching the case as being about the "substantive scope" of Title IX (Pet. Br. 10), and not about implied rights of action, is clear enough. In order to prevail, he needs to avoid the rigorous, intent-based standard that this Court has developed over the years to govern the implied-right-of-action analysis. *See, e.g., Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001). Despite some surface appeal, Jackson's arguments about congressional intent are, with respect, pretty flimsy; to the extent his statutory arguments touch on the issue of legislative intent at all, they rely almost entirely on inferences from congressional silence. Presumably recognizing that the evidence he has will not stand up to *Sandoval*-like scrutiny, Jackson seeks to turn this into a garden-variety statutory interpretation case. His effort is misguided, for two reasons.

1. To begin with, this Court has already rejected the view that the only issue in a case like this is the "substantive scope" of the underlying statute. In *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083 (1991), for instance, the Court pointedly criticized cases from the implied-right-of-action heyday for having never focused their "probe of the congressional mind" on "private rights of action, as distinct from the substantive objects of the legislation." The Court stressed the importance under modern doctrine "of enquiring specifically into intent to authorize a private cause of action." *Id.* at 1103; *see also, e.g., Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 639 (1999) (Court must "do more than define the scope of behavior that Title IX proscribes"; must additionally determine whether conduct alleged "support[s] a private suit for money damages").

Jackson cannot side-step this "heightened concern" for congressional intent, *Virginia Bankshares*, 501 U.S. at 1103, simply by citing to *Cannon*. It is just not true that "[t]his case does not require the expansion of th[e] cause of action" recognized in *Cannon*. Pet. Br. 34 n.10. *Cannon* involved a traditional "discrimination" claim (the plaintiff there complained of unequal admissions practices for men and women), not a retaliation claim. It had nothing to say – one way or the other – about retaliation. *Cannon* is thus properly read to recognize an implied private right of action for core Title IX discrimination claims; it cannot fairly be understood to create a one-size-fits-all private remedy for any practice that Title IX might plausibly be construed to prohibit.

The separation-of-powers concerns that animate this Court's implied-right-of-action jurisprudence, *see, e.g., Cannon*, 441 U.S. at 730-31, 743, 746 (Powell, J., dissenting), require a rigorous showing of congressional intent not only to demonstrate the existence of an implied private remedy as an initial matter, but also to justify its scope. Again, *Virginia Bankshares* is illustrative. There, this Court addressed the question whether a minority shareholder could sue under the implied private right of action for §14(a) of the Securities Exchange Act. The Court acknowledged *J.I.*

Case Co. v. Borak, 377 U.S. 426 (1964), which had initially recognized an implied remedy in §14(a), but it did not stop there; instead, it went on to detail the showing a plaintiff must make to "extend the scope" of an existing right of action. 501 U.S. at 1102.

"Assessing the legitimacy of any such extension or expansion," the Court held, "calls for the application of some fundamental principles governing recognition of a right of action implied by a federal statute ...." *Id.* First, the Court emphasized that "recognition of any private right of action for violating a federal statute must ultimately rest on congressional intent to provide a remedy." *Id.* (citing *Touche Ross & Co. v. Reddington*, 442 U.S. 560, 575 (1979)). "From this," the Court continued, "the corollary follows that the breadth of the right once recognized should not, as a general matter, grow beyond the scope congressionally intended." *Id.* Accordingly, even where (as here) the issue is not initial recognition, but expansion, a plaintiff faces a "serious obstacle" where he cannot demonstrate a "manifestation of intent to recognize a cause of action (or class of plaintiffs) as broad as [his] theory" would entail. *Id.*

Jackson thus bears the burden here of showing "affirmative," *Sandoval*, 532 U.S. at 293 n.8, and "persuasive," *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 20 (1979), evidence of Congress' intent to create in Title IX a private right of action for retaliation.

2. Separately, as a Spending Clause statute, *see Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286 (1998), Title IX is subject to the clear-statement rule articulated in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981). That rule, which exists to ensure that a recipient of federal funding exercises its choice to accept funds "knowingly" and "cognizant of the consequences of [its] participation," requires that any enforceable condition on the receipt of funds be stated "unambiguously" in the statute. *Id.* at 17.

Here, of course, the condition that Jackson seeks to enforce is a private remedy for retaliation. The question, accordingly, is not simply whether Title IX's generic

reference to "discrimination" might plausibly be interpreted to reach retaliation. Rather, the question in a case like this is whether the funding recipient "had adequate notice that [it] could be liable for *the conduct at issue*" – here, retaliation. *Davis*, 526 U.S. at 640 (emphasis added). Jackson must therefore show that private liability for retaliation, specifically, so plainly arises from "the clear terms of the relevant statute," *Barnes v. Gorman*, 536 U.S. 181, 187 (2002), that it can be said to be "unambiguous[]," *Pennhurst*, 451 U.S. at 17, or "obvious," *Gebser*, 524 U.S. at 287. That, we respectfully submit, he cannot do.

There is one final point: It would not be enough for Jackson to show (even if he could) that Title IX unambiguously prohibits retaliation. Funding recipients are also entitled under *Pennhurst* to clear notice of how a retaliation prohibition would be enforced – *i.e.*, whether by administrative action alone or by private suits, as well. Not only would a private right of action add a new layer of enforcement, leading, at the very least, to greater administrative costs, it would also bring into play an altogether different range of remedies – most notably, damages, *see Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 76 (1992), and attorneys fees, *see* 42 U.S.C. §1988(b), neither of which is available in an administrative enforcement proceeding. It is easy to see how that additional exposure could affect a recipient's decision whether to accept funding. *See Gorman*, 536 U.S. at 188 ("'Without doubt, the scope of potential damages liability is one of the most significant factors a school would consider in deciding whether to receive federal funds.'" (quoting *Davis*, 526 U.S. at 656 (Kennedy, J., dissenting)). *Pennhurst*'s clear-statement rule thus requires Jackson to show "unambiguous[]" evidence not only that Title IX prohibits retaliation, but also that Congress intended to provide a private right of action for retaliation.

II. Jackson Has Not Shown A Clear Congressional Intent To Prohibit Retaliation, Let Alone To Create A Private Remedy For Retaliation.

None of the traditional indicia of statutory meaning signals a congressional intention to create in Title IX a private right of action for – or, for that matter, even to prohibit – retaliation. Each of Jackson's arguments, we admit, seems reasonable enough on the surface. But none withstands serious scrutiny. Even if Jackson's responsibility here were simply to piece together a sound interpretation of Title IX, we would say he had come up short. He certainly has not carried his burden under the more rigorous interpretive standards applicable to this case.

A. Title IX's Text Does Not Reflect A Clear Congressional Intent To Reach Or Remedy Retaliation.

In relevant part, §901 states that "[n]o person in the United States shall, on the basis of sex . . . be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. §1681(a). As the court of appeals correctly observed, §901 "makes no mention of retaliation at all." Pet. App. 20a. While not disputing that fact, Jackson focuses on the word "discrimination" and asserts that retaliation is "simply one variant" of that "discrimination." Pet. Br. 13. Jackson, however, offers nothing in the way of sustained textual analysis to support that assertion (which, incidentally, the Solicitor General seems to reject, at least as a thoroughgoing textual proposition, *see* U.S. Br. 10 n.1). In fact, the concepts of "discrimination" and "retaliation" are fundamentally different, both as a matter of plain meaning and as a matter of ordinary legal usage.

Standard English and legal dictionaries alike make clear that "discrimination" is a comparative term; it refers to the perception or treatment of one person or thing *in relation to others*. *See, e.g., Black's Law Dictionary* 479 (7th ed. 1999) ("Differential treatment; esp., a failure to treat all persons

equally when no reasonable distinction can be found between those favored and those not favored."); 4 *Oxford English Dictionary* 758 (2d ed. 1989) (term "discriminate" means "[t]o make a distinction; to perceive or note the difference (between things)" or "[t]o make an adverse distinction with regard to; to distinguish unfavourably from others"); *Webster's Third New International Dictionary* 648 (1986) (term "discriminate" means to "recognize as being different from others ...: distinguish between or among").

The case law is to the same effect. This Court has recognized, for instance, that "[c]onceptually, of course, any notion of discrimination assumes a comparison of substantially similar entities." *General Motors Corp. v. Tracy*, 519 U.S. 278, 298 (1997). And indeed, pointing to this Court's precedent, Jackson himself agrees that the "normal definition of discrimination" is the "differential treatment of similarly situated groups." Pet. Br. 13 (quoting *Olmstead v. Zimring*, 527 U.S. 581, 614 (1999) (Kennedy, J., concurring in the judgment)); *see also Zimring*, 527 U.S. at 616-20 (Thomas, J., dissenting) (collecting cases defining discrimination as a comparative concept); *Guardian Industries Corp. v. NLRB*, 49 F.3d 317, 319 (7th Cir. 1995) (Easterbrook, J.) ("Discrimination is a form of inequality, which poses the question: 'equal with respect to *what*?'.").[1]

The problem for Jackson is that he does not claim to have been disadvantaged in a comparative sense – *i.e.*, to have been treated unfairly in relation to someone else. Rather, Jackson's beef is with the school board's treatment of him in an absolute sense; specifically, he contends that he was given "negative evaluations" and was ultimately "terminated" from his coaching duties. J.A. 10. Unlike a

[1] There is no basis here for departing from the ordinary meaning of "discrimination" as a comparative concept. In adopting a specialized understanding of the term "discrimination" as including the seemingly non-comparative practice of isolation, the majority in *Zimring* pointed to the ADA's statutory findings, which expressly define isolation as a "form[] of discrimination." *Id.* at 588-89, 600. Title IX's text, by contrast, provides no justification, in findings or elsewhere, for straying from the usual, equality-based understanding of the term "discrimination."

typical "discrimination" claim, consideration of Jackson's complaint requires no knowledge of (and thus offers no allegations concerning) others' circumstances. Assuming the truth of the facts stated in the complaint, what happened to Jackson was wrong; it was unjustified – but it was not "discrimination." *Cf. North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982) ("[A] female employee who works in a federally funded education program is 'subjected to discrimination under' that program if she is paid a *lower* salary for like work, given *less* opportunity for promotion, or forced to work under *more* adverse conditions *than are her male colleagues*." (emphasis added)).

We are not splitting hairs here. Dictionary definitions aside, there is a sense in the legal vernacular in which everyone knows that discrimination and retaliation are distinct concepts. Judge Posner has described them as *quintessentially* distinct. Addressing the question whether a plaintiff's false-arrest and excessive-force claims were related for attorneys-fees purposes, Judge Posner explained that they were "as different as a claim of discrimination and a claim of retaliation for opposing that discrimination." *Lenard v. Argento*, 808 F.2d 1242, 1246 (7th Cir. 1987); *see also Great Am. Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 387 (1979) (White, J., dissenting) (right "to be free from retaliation" is "clearly" distinct from the right "not to be discriminated against"). And indeed, Jackson's pleadings show that even he appreciates the difference. In its motion to dismiss, the school board, unable to make out the particulars of Jackson's complaint, assumed that he was attempting to assert both a "discriminat[ion]" claim and a "retaliation" claim. J.A. 13. In response, Jackson answered that, no, he was not raising a "discriminat[ion]" claim, only a "retaliation" claim. J.A. 25.

This Court faced – and rejected – a textual argument very much like Jackson's in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994). The question there was whether the right of action that courts had found implied in §10(b) of the Securities Exchange Act

and Rule 10b-5 could be extended to permit suits for aiding and abetting. In answering that question, the Court started from the premise that a "private plaintiff may not bring a 10b-5 suit against a defendant for acts not prohibited by the text of §10(b)." *Id.* at 173 (quoted in *Sandoval*, 532 U.S. at 285-86). The primacy of statutory text, the Court observed, "bode[d] ill" for the plaintiffs because "'the language of Section 10(b) does not in terms mention aiding and abetting.'" *Id.* at 175. The same, of course, is true here; Title IX "does not in terms mention" anything about retaliation. Like Jackson here, the *Central Bank* plaintiffs sought to "overcome th[at] problem" by pointing to arguably broad statutory language. As Jackson invokes the term "discrimination," the plaintiffs there pointed to the phrase "directly or indirectly," which they said could be read to cover aiding and abetting. *Id.* at 175-76. The Court rejected the effort to finesse the statute's ordinary meaning there, and it should do so here, as well. Jackson's loose construction of the term "discrimination," like other attempts at loose construction before his, would impermissibly "'add a gloss to the operative language of the statute quite different from its commonly accepted meaning.'" *Id.* at 174 (quoting *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 199 (1976)).

B. Statutory Structure Does Not Indicate A Clear Congressional Intent To Reach Or Remedy Retaliation.

Jackson's reading of §901 finds no support in the statutory structure. In fact, the most compelling piece of structural evidence cuts the other way.

1. As the court of appeals emphasized, the absence of an anti-retaliation provision in Title IX stands in stark contrast to this Nation's other major gender-discrimination statute, Title VII. *See* Pet. App. 20a. In Title VII, Congress dealt with employment discrimination in one statutory section, 42 U.S.C. §2000e-2, and then addressed retaliation, expressly, in an altogether separate section, 42 U.S.C. §2000e-3(a). Title VII's structure teaches two things about Title IX's meaning.

First retaliation is not, as a textual matter, "simply one variant of discrimination." Pet. Br. 13. If it were, Title VII's express prohibition of retaliation would be superfluous, having been subsumed under §2000e-2's general anti-discrimination provision. Second, when Congress wants to address retaliation, it knows how to do so and does so expressly. "The fact that [Congress] enacted no analogous provisions in the legislation here at issue strongly suggests that Congress was simply unwilling to impose any potential monetary liability on a private suitor" for retaliation. *Transamerica*, 444 U.S. at 21.

The implication that arises from Title VII's structure – that Title IX does not reach, much less remedy, retaliation – is in no way undermined by the fact that Titles VII and IX originated in separate Acts. For one thing, this Court has never confined itself to the provisions of the statute in question in determining whether the express prohibition of conduct in one place suggests its exclusion in another. In *Central Bank*, for instance, in refusing to extend the scope of §10(b)'s implied right of action to include aiding-and-abetting liability, the Court looked to statutes wholly outside the securities-law context; even the fact that those seemingly far-flung statutes explicitly addressed secondary liability, the Court concluded, weighed against the extension of §10(b)'s implied remedy. *See* 511 U.S. at 182-83 (reviewing, *e.g.*, Internal Revenue Code, National Bank Act, Federal Reserve Act, and Packers and Stockyards Act); *see also Transamerica*, 444 U.S. at 20-21 (looking to 1933 Securities Act and 1934 Securities Exchange Act to construe 1940 Investment Advisors Act). As in *Central Bank*, context and structure indicate that Congress has "taken a statute-by-statute approach," 511 U.S. at 182 – here, to the issue of retaliation. Title VII expressly addresses it; Title IX does not.

Moreover, the structural inference is stronger here than *Central Bank*, for two reasons. First, Title VII and Title IX are derived from separate Acts only in the most formal sense. Title IX, of course, "'was patterned after Title VI of the Civil Rights Act of 1964.'" *Sandoval*, 532 U.S. at 280 (quoting

Cannon, 441 U.S. at 694). When Congress enacted the Civil Rights Act of 1964, which included both Titles VI and VII, it addressed retaliation only in Title VII. Where, as in that instance, "'Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Russello v. United States*, 464 U.S. 16, 23 (1983). That same presumption – that Congress intentionally omitted any prohibition on retaliation from Title VI – carries over to Title VI's clone, Title IX.

Second, although Titles VII and IX technically arise from separate Acts, and although Title IX is principally patterned on Title VI, Congress clearly had its eye on Title VII when enacting Title IX. Indeed, Congress expressly modeled at least one provision of Title IX – §901(b), designed to prohibit quotas, 20 U.S.C. §1681(b) – on a provision of Title VII, 42 U.S.C. §2000e-2(j). *See Cohen v. Brown Univ.*, 101 F.3d 155, 174-75 (1st Cir. 1996) ("Section 1681(b) was patterned after §703(j) of Title VII ...."). Plainly, then, Congress knew how to incorporate Title VII standards and provisions when it wanted to. It did not do so with respect to retaliation.

2. Jackson and his amici offer two structural arguments of their own, neither of which is persuasive. First, Jackson emphasizes that §901's prohibition of discrimination "is followed by a list of nine detailed exceptions." Pet. Br. 12. "That structure," he asserts, "indicates that Congress intended to prohibit all types of discrimination except for the particular forms of discrimination expressly excepted from Title IX's coverage." Pet. Br. 13. If the exceptions catalogued in §901(a)(1)-(9) really did address particular "forms of discrimination," as Jackson says, his argument might have some force. But they don't. Instead, the exceptions are for particular types of *institutions* – certain religious schools, traditionally single-sex schools, fraternities and sororities, and so on. Jackson seeks to draw an inference about the kinds of discrimination prohibited by Title IX from

the kinds of institutions exempted from Title IX's scope. With respect, there is no logic in that.[2]

Second, Jackson points to a veterans-benefits statute, 38 U.S.C. §516(d), which refers, in part, to "discrimination, including retaliation." Pet. Br. 13. That provision, Jackson says, demonstrates that retaliation is "a form of" discrimination. There are two problems. As an initial matter, it seems to us just as likely that the structural inference runs in the opposite direction: Section 516(d) simply shows that when Congress wants to define discrimination to include retaliation, it does so expressly. Indeed, Jackson's reliance on §516(d) undermines any *textual* argument he might be trying to make. If retaliation really were just part and parcel of the term "discrimination," then the phrase "including discrimination" in §518(d) would be redundant. The second problem is that just as often, Congress treats "discrimination" and "retaliation" as distinct wrongs giving rise to distinct claims. For one notable example, see The Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002, Pub. L. 107-174, Title II, 116 Stat. 566 (2002) ("Discrimination and Retaliation"), and the committee report accompanying the same, S. Rep. 107-143, at 7 (Apr. 15, 2002) (referring to "discrimination or retaliation complaints"). *See also, e.g.*, 44 U.S.C. §3507(e)(3)(B) ("retaliation or discrimination").

---

[2] Jackson's effort to obscure the unfavorable comparison to Title VII suffers from a similar logical flaw. Jackson contends that Titles VII and IX are "crucial[ly]" different in that Title IX speaks to "discrimination" generally while Title VII "spells out in detail the specific forms of conduct that violate the statute." Pet. Br. 34. Thus, Jackson insinuates, courts shouldn't expect the same level of precision with respect to retaliation in Title IX that Title VII offers. The problem, again, is that Title VII does not detail the "specific forms of conduct" that constitute "discrimination" under the statute. Instead, it specifies *areas* (hiring and firing, compensation, etc.) and *organizations* (employment agencies, labor unions, etc.) in which "discrimination" is prohibited. Fundamentally, Title VII separately prohibits two kinds of conduct: discrimination, 42 U.S.C. §2000e-2, and retaliation, 42 U.S.C. §2000e-3(a). Title IX only addresses the former.

C. The "Context" Surrounding Title IX's Enactment Does Not Suggest A Clear Congressional Intent To Reach Or Remedy Retaliation.

Jackson's argument from contemporary "context" is likewise bereft of any "affirmative" evidence, *see Sandoval*, 532 U.S. at 293 n.8, that Congress intended to create a private right of action for (or, for that matter, even to prohibit) retaliation. Jackson relies on three specific aspects of the context in which Title IX was enacted. None is availing.

1. *Legislative History.* Title IX's legislative history is "sparse." *Grove City Coll. v. Bell*, 465 U.S. 555, 566 (1984), *superseded in part by statute*, 20 U.S.C. §1687. Because the principal sections of Title IX – §§901 and 902 – "originated as a floor amendment, no committee report discusses the provisions." *North Haven*, 456 U.S. at 527. Accordingly, this Court has said that the "only authoritative indications of congressional intent regarding the scope of §§901 and 902" are the floor statements of Senator Birch Bayh, Title IX's Senate sponsor. *Id.*

Jackson, though, does not rely (nor could he, as we will show) on Senator Bayh's statements to demonstrate that Congress intended Title IX to reach retaliation. Instead, Jackson points to what he calls "extensive testimony" presented to a House subcommittee during the summer of 1970. Pet. Br. 19-20; *see also, e.g.*, U.S. Br. 5, 14 ("substantial evidence"); ABA Br. 8-9 ("substantial testimony"). That testimony, Jackson says, shows that "sex discrimination in educational programs frequently takes the place of retaliation." Pet. Br. 19. Even aside from the fact that "[t]he proposal on which the hearings were held ... never emerged from committee," *North Haven*, 456 U.S. at 523 n.13, there are two problems with Jackson's reliance on those hearings.

The first problem is specific to the hearing testimony itself – and, in particular, to the characterization of that testimony as "extensive" and "substantial." Jackson and his amici have pointed to snippets of five witnesses' statements to the House subcommittee as indicative of Congress' intent.

See Pet. Br. 19-20; U.S. Br. 15-16. Even if those five witnesses had testified expressly that Congress should prohibit or provide a private remedy for retaliation – none did – any inference of congressional intent would be pretty weak. Consider that the hearings from which Jackson and his amici have mined their testimony (i) spanned seven days; (ii) included 183 statements, letters, articles, etc., from 84 witnesses, commentators, etc.; and (iii) filled 1261 transcript pages. Against that backdrop, a handful of anecdotes about retaliation, without any express call for congressional action targeting it, doesn't amount to much.

The second problem is one endemic to any attempted reliance on hearing testimony as evidence of Congress' intent. This Court has consistently accorded little, if any weight, to such testimony. *See generally* John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 Sup. Ct. Rev. 223, 264 n.193 (collecting cases). And with good reason. Even aside from its other well-documented shortcomings, *see* Reed Dickerson, *Statutory Interpretation: Dipping Into Legislative History*, 11 Hofstra L. Rev. 1125, 1131-32 (1983), hearing testimony in and of itself tells us nothing about how Congress responded – or didn't, as the case may be – to the witnesses' concerns.

Jackson's point seems to be that, having heard the five witnesses' testimonies, snippets of which recounted acts of retaliation, Congress *must* have intended to remedy retaliation. As the Solicitor General puts it, "[t]here is no reason that Congress would have responded to that evidence" by failing to address it. U.S. Br. 16; *see also id.* at 6 ("There is no reason that Congress would have wanted ...."). But that is not an argument based on any "affirmative" evidence of congressional intent. It is an argument based, at most, on an inference from congressional silence. At the end of the day, neither Jackson nor any of his amici (including, with respect, Senator Bayh) has pointed to a shred of evidence in the legislative record of any actual congressional intent to reach retaliation. *See* Bayh Br. 13-18.

Nor has our own review revealed any such evidence. Two particular aspects of Title IX's legislative history are worth noting. First, the House report that was the culmination of the 1970 hearings makes no mention of retaliation. On the contrary, in summarizing the hearing testimony (and, in that connection, the House precursor to Title IX), the report refers to the prohibited "discrimination" exclusively in the usual, comparative, equality-based sense. *See* H.R. Rep. No. 92-554, *reprinted in* 1972 U.S.C.C.A.N. 2462, 2511-12 (Oct. 8, 1971) (targeted "discrimination" entails, *e.g.*, requiring women "to meet higher admission standards than men" and "sex differences in rank and salary"). Second, the evidence from the floor debates is uniformly to the same effect. Time and again, Senator Bayh referred to the "discrimination" with which Title IX was concerned in terms of the "differential treatment" of, and "disparit[ies]" between, men and women. *E.g.*, 118 Cong. Rec. 5804, 5805, 5807 (Feb. 28, 1972); 117 Cong. Rec. 30407 (Aug. 6, 1971). To make his point, Senator Bayh repeatedly cited statistics comparing men's and women's circumstances with respect to hiring, promotions, pay, admissions, enrollment, and scholarships. 118 Cong. Rec. 5804, 5805, 5809. Indeed, at one juncture, having offered one of these line-by-line comparisons, Senator Bayh stated that this was the "type of discrimination to which I refer." 117 Cong. Rec. 30403.

2. *The* Sullivan *Decision.* Jackson and his amici likewise seek to rely, as an aspect of contemporary context bearing on congressional intent, on this Court's decision in *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969). *Sullivan*, Jackson says, "held" that 42 U.S.C. §1982, which prohibits discrimination in property transactions, "also protects from retaliation those who complain about such discrimination," and thus "established th[e] principle" that statutory bans on discrimination "are construed to include prohibitions on retaliation." Pet. Br. 8, 14. From *Sullivan*, Jackson asserts, it can be inferred that Congress "presumably intended" Title IX's prohibition on "discrimination" to entail an unstated remedy for retaliation, as well. Pet. Br. 21. As put by the

Solicitor General, in the light of *Sullivan*, Congress "would have understood" that a ban on discrimination would "simultaneously forbid" retaliation, and thus "would have seen no need" to address retaliation specifically. U.S. Br. 11-12.

Jackson's reliance on *Sullivan* as proof of Congress' intent is misplaced. First, as a summary of his arguments makes clear, Jackson's position is not founded on any affirmative evidence of congressional intent. Rather, it, too, rests on an inference from congressional silence. *See also* ABA Br. 3 ("Congress would have had no reason to assume ...."); New York Lawyers Br. 14 ("Congress certainly contemplated ...."). Perhaps that inference would be warranted had *Sullivan* said in so many words what Jackson claims it said - namely, that a general ban on discrimination necessarily entails a prohibition on retaliation. But, as we show next, it did not.

Jackson and his amici point to a paragraph in *Sullivan* that does, in fairness, address a neighborhood association's expulsion of a white homeowner (Sullivan) "for the advocacy of [his black lessee's] cause." 396 U.S. at 237. And the paragraph does state that Sullivan had been "punished for trying to vindicate the rights of minorities protected by §1982." *Id.* But far from climaxing - as Jackson suggests - with a resounding affirmation that any statutory prohibition on discrimination necessarily entails a corollary remedy for retaliation, the paragraph concludes (with something of a thud) by stating, cryptically, that *Sullivan* "ha[d] standing to maintain" his lawsuit. *Id.* And, indeed, *Barrows v. Jackson*, 346 U.S. 249 (1953), which the *Sullivan* Court cited for support, was purely a third-party standing case; it had nothing to do with private rights of action. *See id.* at 255-60.

There is no evidence that *Sullivan* was understood - let alone universally understood - in the years leading up to Title IX's passage the way that Jackson characterizes it today. Indeed, even Justice Harlan, dissenting in *Sullivan*, was unsure of what to make of the Court's decision. With respect to the issue of "relief for Sullivan," Justice Harlan called the majority opinion "highly elliptical." 396 U.S. at

251 (Harlan, J., dissenting). The opinion, he said, did not in any way "explain[] what legal standards should determine Sullivan's rights under §1982"; instead, it "simply state[d] that 'Sullivan has standing to maintain this action' under §1982." *Id.* at 254. That, Justice Harlan said, could mean any number of things for private-right-of-action purposes. Indeed, Justice Harlan imagined four possibilities, only one of which seems to bear any resemblance to a modern-day retaliation claim. *See id.* at 255 ("Or does the Court think that §1982 gives Sullivan a right to relief from injuries that result from his 'legitimate' protest aimed at convincing the Board to accept Freeman?"). Perhaps not surprisingly, we are also not aware of any indication that lower courts had, in the period preceding Title IX's enactment, construed *Sullivan* to "establish[] th[e] principle" (Pet. Br. 8) that a prohibition on "discrimination" necessarily entails a remedy for retaliation. A computer search designed to identify any such decisions produced none.

Jackson's reliance on *Sullivan* also faces the separate problem that §1982 and Title IX were enacted pursuant to different constitutional powers and, accordingly, are subject to different interpretive principles. Section 1982 is "authorized by the Enabling Clause of the Thirteenth Amendment" – arguably the most sweeping grant of federal power in the Constitution – and is thus to be given the broadest possible construction. 396 U.S. at 235. As a Spending Clause statute, by contrast, Title IX is subject to *Pennhurst*'s rule that its conditions be clear and unambiguous. Thus, even if *Sullivan* had definitively construed §1982's prohibition of discrimination to reach retaliation, that construction would not necessarily carry over to the Title IX context.

3. *Contemporary Title VI Precedent.* One final piece of context to which Jackson points as evidence of Congress' intent in enacting Title IX is the state of Title VI law in the years leading up to 1972. *See, e.g.*, Pet. Br. 21-22. Jackson is right to look to pre-1972 Title VI precedent; this Court said in *Cannon* that "[t]he drafters of Title IX explicitly assumed

that it would be interpreted and applied as Title VI had been during the preceding eight years." 441 U.S. at 696. But a review of Title VI case law fails to demonstrate anything approaching a consensus that Title VI even reached retaliation, much less made it privately actionable.

According to our research, none of the 17 cases cited in *Cannon* as evidence that by 1972 Title VI "had already been construed as creating a private remedy," *id.* at 696 & n.21, dealt with, or even mentioned, retaliation. Nor, for that matter, are we aware of any Title VI case (Jackson has pointed to none) during the 1964-1972 era adjudicating a retaliation-based Title VI claim. To be sure, there are several cases – we have found three, including the lone case Jackson cites, *United States v. Jefferson County Bd. of Educ.*, 380 F.2d 385 (5th Cir. 1967) (en banc) – that refer elliptically to retaliation. *See also United States v. Medical Soc'y of S.C.*, 298 F. Supp. 145, 158 (D.S.C. 1969); *Moses v. Washington Parish Sch. Bd.*, 276 F. Supp. 834, 855 (D. La. 1967). But importantly for present purposes – discerning the 1972 Congress' view of the scope of Title VI itself – those were not cases in which retaliation formed the basis of any plaintiff's Title VI claim; rather, retaliation was an issue in those cases only insofar as the judges involved had inserted prophylactic anti-retaliation provisions into broad remedial decrees.

* * *

Even aside from the arguments' individual weaknesses, a common problem pervades Jackson's efforts to conjure congressional intent from the contemporary context in which Title IX was enacted: In the absence of any direct evidence that Congress thought about retaliation one way or the other when drafting Title IX, Jackson's arguments rest entirely on inferences from Congress' silence. *See, e.g.*, Pet. Br. 21 ("Congress presumably intended ...."); New York Lawyers Br. 11 ("Congress must have been aware ...."); ABA Br. 7 ("Congress therefore had reason to understand ....").

Central Bank – which, like this case, involved the scope of an existing implied right of action – expressly rejected the very sort of inferential reasoning that Jackson urges here.

The question there, again, was whether the implied right of action recognized under Securities Exchange Act §10(b) should be construed to reach aiding-and-abetting claims. Having held that "[t]he text d[id] not support" the proposed extension, 511 U.S. at 180, the Court went on to consider an argument that parallels Jackson's position here almost precisely: The SEC contended that "Congress legislated with an understanding of general principles of tort law and that aiding and abetting liability was 'well established in both civil and criminal actions by 1934.'" *Id.* at 181. "Thus," its argument went, "'Congress intended to include' aiding and abetting liability in the 1934 Act." *Id.*

This Court refused to credit this invocation of what it called "implicit congressional intent." *Id.* at 183. "Even assuming ... a deeply rooted background of aiding and abetting tort liability," the Court held, "it does not follow that Congress intended to apply that kind of liability to the private causes of action in the securities Acts." *Id.* at 184. Finding no direct evidence of an affirmative intention to include aiding-and-abetting liability within the scope of the §10(b) implied remedy, this Court held – in words equally applicable here – that it was "not plausible to interpret the statutory silence as tantamount to an implicit congressional intent" to extend the right of action to impose that liability. *Id.* at 185. *See also Touche Ross*, 442 U.S. at 571 ("[I]mplying a private right of action on the basis of congressional silence is a hazardous enterprise, at best.").

D. The Administrative Regulation That Jackson Invokes Cannot Be Read To Create A Private Remedy For Retaliation.

Jackson also asks this Court to defer to an administrative regulation promulgated by the Department of Education, *see* 34 C.F.R. §100.7(e), that, he says, definitively "interpret[s] Title IX's core prohibition on discrimination" to reach retaliation. Pet. Br. 9. In relying on the regulation, Jackson seeks to bring himself within the ambit of this Court's statement in *Sandoval* that regulations that "authoritatively

construe the statute itself" may be enforced through an implied right of action applicable to that statute, because a "Congress that intends the statute to be enforced through a private cause of action intends the authoritative interpretation of that statute to be so enforced as well." 532 U.S. at 284. In *Sandoval*, of course, the Court held that Title VI's disparate-impact regulations do not qualify because they "forbid conduct that §601 permits," namely, unintentional discrimination. *Id.* at 285. By contrast, Jackson asserts, §100.7(e) does "not extend the protection of Title IX beyond its terms" but, instead, "reflect[s] an 'interpretation of the terms of Title IX itself.'" Pet. Br. 33.

Jackson is wrong. In order to trigger the permissive treatment outlined in *Sandoval*, Jackson and his amici repeatedly describe §100.7(e) – as incorporated for Title IX purposes, *see* 34 C.F.R. §106.71 – as an authoritative "interpretation," or "construction," of §901's ban on "discrimination." *E.g.*, Pet. Br. 3, 4, 9, 21, 27, 29, 33; U.S. Br. 6, 16, 17, 19; New York Lawyers Br. 9, 12, 15-16; Leadership Conf. Br. 12-13. But in fact, §100.7(e) is not, and does not purport to be, an authoritative interpretation of the term "discrimination." It is instead, as we will show, merely a procedural rule governing the conduct of administrative investigations. This case, accordingly, does not concern the kind of regulation posited by the Court during oral argument in *Sandoval* – that is, "an interpretive regulation which [is] not precluded by [the Court's] case law" in that it does not "say that you don't have to have intentional discrimination," but says instead that "this is what intentional discrimination consists of." Tr. of Oral Arg. 26. That, as we said then, might be "a harder case." *Id.* But it is not *this* case.

In relevant part, the regulation Jackson cites provides that –

> No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by section [901] of the Act

> or this part, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this part.

34 C.F.R. §100.7(e). Jackson and his amici correctly point out that subsection (e) is titled "Intimidating or retaliatory acts prohibited." What they uniformly fail to acknowledge is the larger context in which subsection (e) is situated.

Section 100.7 itself – of which subsection (e) is a part – is titled "Conduct of investigations." And the context could not be clearer that it is official, administrative investigations by the Department of Education to which the regulation is addressed. Subsection (a) requires Department officials to perform periodic compliance reviews of fund recipients; subsection (b) authorizes individuals to file administrative complaints with Department personnel; subsection (c) briefly describes the sort of investigation the Department should conduct; and subsection (d) addresses how the Department will resolve investigations. *It is against that backdrop* that subsection (e) prohibits retaliation against individuals who cooperate in official Department investigations. Section 100.7(e), therefore, is at most a valid §902 regulation aimed at "effectuat[ing]" §901's discrimination prohibition. *See Sandoval*, 532 U.S. at 281-82 (assuming validity of §602 regulations "proscribing" conduct not within the core of §601). It is *not* an "authoritative interpretation," *id.* at 284, of §901's ban on "discrimination" to include retaliation – or, for that matter, even a generally applicable prohibition of retaliation.

Additional context confirming that §100.7(e) is merely a procedural rule for the conduct of administrative investigations – and not an authoritative interpretation of §901 itself – is found in 34 C.F.R. §106.71, the regulation that incorporates §100.7(e) for Title IX purposes. Section 106.71, titled "Procedures," adopts and incorporates the "procedural provisions" applicable to Title VI and states that "[t]hese procedures" are found at 34 C.F.R. 100.6-100.11 and 34 CFR, Part 101." Like §100.7(e) itself, all of the regulations

cross-referenced in §106.71 concern "the practice for hearings, decisions, and administrative review conducted by the Department of Education." 34 C.F.R. §101.1; *see also, e.g.*, 34 C.F.R. §§100.6 ("Compliance information"), 100.8 ("Procedure for effecting compliance"), 100.9 ("Hearings"), 100.10 ("Decisions and notices"), 100.11 ("Judicial review").

As a "procedural provision[]," §100.7(e) stands in stark contrast to other Title VI and Title IX regulations that at least arguably do "interpret" or "construe" those statutes' bans on "discrimination." Both sets of regulations, for instance, contain "Definitions" sections explaining all manner of terms. *See* 34 C.F.R. §§100.13 (Title VI), 106.2 (Title IX). Notably, neither defines the term "discrimination" to include retaliation – or, for that matter, mentions retaliation at all. Section 100.7(e) also contrasts with substantive regulations aimed specifically at fleshing out the contours of prohibited "discrimination." On the Title IX side, for instance, §106.21 prescribes both "[g]eneral" and "[s]pecific prohibitions" on discrimination in admissions; it says nothing about retaliation. Similarly, §106.31 prescribes "[g]eneral" and "[s]pecific prohibitions" on discrimination in educational and extracurricular programs; again, nothing about retaliation. Sections 106.37 and 106.51 prohibit a number of specific forms of discrimination in financial aid and employment, respectively; neither says anything about retaliation. Likewise, the principal substantive regulation implementing Title VI's ban on discrimination, titled "Discrimination prohibited," identifies and proscribes both "[g]eneral" and "[s]pecific discriminatory actions" but does not mention retaliation. 34 C.F.R. §100.3.

It is in these definitional and substantive regulations – not in §100.7(e)'s "procedural provision[]" – that one might expect to find an authoritative construction of §901's ban on "discrimination." Indeed, every one of the cases cited in *Sandoval* as involving "authoritative interpretation[s]," 532 U.S. at 284, dealt with regulations that explicitly defined or interpreted ambiguous statutory terms or phrases. *Chevron* itself, for instance, concerned an EPA rule expressly defining

the term "stationary source" as used in the Clean Air Act. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984). Likewise, the Court in *Nationsbank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251 (1995), deferred to an OCC letter-ruling expressly construing the National Bank Act's phrase "incidental to the business of banking." *Id.* at 257. The same, notably, is true of the various cases the *Sandoval* Court cited as having "'assumed' that a cause of action to enforce a statute includes one to enforce its regulations." 532 U.S. at 284. Those cases, too, concerned "authoritative" agency constructions in the *Chevron* sense – *i.e.*, regulations that, by their very terms, set out to define or interpret ambiguous statutory language. *See NCAA v. Smith*, 525 U.S. 459, 467-68 (1999) (regulation expressly defining term "recipient" in "Definitions" provision); *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 280 (1987) (regulation expressly defining terms "physical impairment" and "major life activities" in "Definitions" provision); *Bazemore v. Friday*, 478 U.S. 385, 408-09 (1986) (White, J., joined by four other Justices, concurring) (regulation expressly identifying "[d]iscrimination prohibited" under statute); *Alexander v. Choate*, 469 U.S. 287, 304-05 & n.25 (1985) (same); *Lau v. Nichols*, 414 U.S. 563, 567-68 (1974) (same).

Indeed, even the regulation at issue in *Sandoval* itself – which, of course, the Court found categorically beyond the authoritative-construction pale and thus ineligible for enforcement pursuant to Title VI's implied right of action – at least purported to interpret the statutory term "discrimination" in a way §100.7(e) does not. The regulation there, titled "Discrimination prohibited," expressly identified both "[g]eneral" and "[s]pecific discriminatory actions." 28 C.F.R. §42.104. The "procedural provision[]" on which Jackson relies here doesn't even do that. Thus, in a very real sense, Jackson's invocation of §100.7(e) to support his retaliation claim is even more strained than the regulation-based argument this Court rejected in *Sandoval*.

III. Jackson's Reliance On Title IX's Perceived "Purposes" And "Policies" Is Misplaced.

Without any meaningful support in the text, structure, or context of Title IX itself – or, as we have just shown, in the only Title IX regulation that even mentions retaliation – Jackson's position boils down to public policy. At bottom, that is, Jackson's argument is not so much that retaliation *is* discrimination but, instead, that an additional layer of protection against retaliation would facilitate the operation of Title IX's anti-discrimination provision. Jackson repeatedly asserts, for instance, that protection from retaliation is "critical to the effectiveness" of Title IX's prohibition on gender discrimination (Pet. Br. 2) and important if the statute "is to achieve its underlying purposes" (Pet. Br. 9). *See also, e.g.*, Pet. Br. 22-26 ("critical to achieving the statute's purposes"); U.S. Br. 12-14 ("important to the achievement of Title IX's purposes"); Women's Sports Br. (entire brief devoted to policy arguments); Women & Families Br. (same). Specifically, Jackson contends that Title IX could not achieve its objectives if recipients of federal funds "felt free to retaliate" against those who complain about prohibited discrimination. Pet. Br. 22.

We will leave it to the experts to set the public-policy record straight. *See generally* Br. for National School Boards Association *et al.* Our purpose here is to point out two fundamental legal problems with Jackson's policy arguments. First, they are irrelevant here. As *Sandoval* makes clear, this Court has long since "abandoned th[e] understanding" – once the governing rule for implied-right-of-action cases – that "'it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose' expressed by a statute." 532 U.S. at 287 (quoting *Borak*, 377 U.S. at 433). Under what the *Sandoval* Court called the "*ancien regime*," *id.*, a federal court could imply a right of action whenever "that remedy [was] necessary or at least helpful to the accomplishment of the statutory purpose" or, put another way, could provide some "effective assistance to achieving statutory purposes."

Cannon, 441 U.S. at 703, 708. Under the Court's current, more restrained approach, it does not "matter how desirable [a right of action] may be as a policy matter, or compatible with the statute"; all that matters is "[s]tatutory intent." *Sandoval*, 532 U.S. at 286-87; *accord, e.g., Central Bank*, 511 U.S. at 177, 188 ("[p]olicy considerations" irrelevant except to show result "'so bizarre' that Congress could not have intended it"); *Thompson v. Thompson*, 484 U.S. 174, 187 (1988) (Court "'will not engraft a remedy on a statute, no matter how salutary'" (quoting *California v. Sierra Club*, 451 U.S. 287, 297 (1981))); *Transamerica*, 444 U.S. at 15-16, 23 (relevant issue not "utility" or "desirability of implying private rights of action in order to provide remedies thought to effectuate the purposes of a given statute" but, rather, "whether Congress intended to create the private remedy asserted").[3]

There is another problem. Jackson and his amici frame this case as offering the Court a binary choice: either (i) it must recognize an implied right of action for retaliation or (ii) it will leave those who complain about discrimination wholly unprotected. Absent the implication of a private remedy for retaliation, the argument goes, recipients of federal funds will feel "free to retaliate" against (Pet. Br. 22) and "free to punish" (New York Lawyers Br. 7) complainants - who, in turn, will be "without recourse" (Women & Families Br. 16). Jackson's message is clear: without a private cause of action, those who complain about discrimination cannot be "safe from reprisal." Pet. Br. 12.

But the choice is not all or nothing. There remains an intermediate remedial option - namely, the option Congress itself envisioned when it enacted Title IX in the first place. Even absent a private right of action under §901, the

[3] *Musick, Peeler & Garrett v. Employers Ins. of Wassau*, 508 U.S. 286 (1993), which may at first blush appear to turn on policy considerations, is distinguishable. There, the Court held that Rule 10b-5's implied right of action allows for contribution among joint tortfeasors. Key to the decision was the fact that a contribution remedy merely allocates liability for a wrong - securities fraud - that the Court had "already deemed actionable under federal law." *Id.* at 292. Here, by contrast, the question presented is whether retaliation *should* be "deemed actionable under" Title IX.

Department of Education retains the power under §902 to proceed against retaliators administratively. As the Solicitor General acknowledges, "[e]ven if Section 1681 did not bar retaliation, federal agencies would still have rulemaking authority to bar that practice." U.S. Br. 20 n.3; *see also Gebser*, 524 U.S. at 292 (agencies may enforce requirements "that effectuate [Title IX's] antidiscrimination mandate, 20 U.S.C. §1682, even if those requirements do not purport to represent a definition of discrimination under the statute"). Accordingly, federal agencies may target retaliation under Title IX even where private suitors may not.

Pursuant to its administrative-enforcement authority, the Department may "take such remedial action as [it] deems necessary to overcome the effects" of discrimination. 34 C.F.R. §106.3. That remedial action may of course include the ultimate sanction of terminating federal funding. But the Department needn't go so far every time. Rather, the regulations make clear that it may first attempt to remedy violations "by informal means" and, failing that, by "the suspension" of funds. *Id.* §100.8 (incorporated in 34 C.F.R. §106.71). And, indeed, the Department itself touts its "flexible approach" to enforcement, including, *e.g.*, "voluntary resolutions," "agreements with recipients," "violation letters," and "negotiations." U.S. Department of Education Office of Civil Rights, Annual Report to Congress: Fiscal Years 2001 and 2002 (July 2003), www.ed.gov/about/offices/list/ocr/AnnRpt2002. Finally, as Senator Bayh himself explained during the debate on Title IX, the mere threat of terminating a recipient's federal funding will often convince it to change its ways: "The civil rights experience ... indicates that the very possibility of such a sanction has worked wonders." 117 Cong. Rec. 30408.

Jackson suggests - without ever really explaining why - that administrative enforcement is not an "effective remedy against reprisal." Pet. Br. 22; *see also* U.S. Br. 13 ("effective protection," "sufficient deterrent"). Jackson's amici likewise contend, for instance, that "administrative procedures are less efficient mechanisms for enforcing Title IX" and that

private lawsuits are "more efficient." Women's Sports Br. 22-23. But, in so arguing, Jackson and his amici are, with respect, just penciling in their reasoning in reverse: because the remedy that Congress did provide (administrative enforcement) is in some sense not ideal, this Court ought to imply a remedy that Congress did not. This Court has rejected precisely that sort of argument before, and should do so again here. *See, e.g., Touche Ross*, 442 U.S. at 578 ("The ultimate question is one of congressional intent, not one of whether this Court thinks it can improve upon the statutory scheme that Congress enacted into law.").

IV. Any Extension Of A Private Remedy Beyond Direct Victims Would Impermissibly Expand The "Special Class" For Whose Benefit Title IX Was Enacted.

There is a final reason that this case is particularly ill-suited to the creation of a private right of action for retaliation: Jackson, a male basketball coach, does not himself claim to have been subjected to gender discrimination. (Any suggestion in Jackson's brief to the contrary, *see* Pet. Br. 41-43, is inconsistent with his position in the lower courts. *See supra* at 9.) Accordingly, Jackson is "plainly not within the class meant to be protected by Title IX." Pet. App. 23a. Jackson asserts that there is "no basis in precedent" for limiting Title IX's coverage to direct victims of discrimination. Pet. Br. 38. With respect, he is wrong.

This Court's cases have repeatedly emphasized that a key consideration in deciding whether to recognize a private remedy is "whether the statute was enacted for the benefit of a special class of which the plaintiff is a member." *Cannon*, 441 U.S. at 689. Indeed, even in the heyday of implied private rights, the decisive question was whether the statute in question "was enacted for the benefit of a special class"; if so, a court could recognize a remedy "for members of that class." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 375 (1982); *see also Cort v. Ash*, 422 U.S. 66, 78 (1975) (whether "the plaintiff [is] 'one of the class for whose *especial* benefit the statute was enacted'" (quoting *Texas &*

Pac. R. Co. v. Rigsby, 241 U.S. 33, 39 (1916))); *Sierra Club*, 451 U.S. at 294 ("particular class of persons").

Cannon is instructive as to the "special class" protected by Title IX. The Court there concluded that a female who had been denied equal treatment in university admissions "because of her sex," 441 U.S. at 680 – and had thus *herself* been subjected to traditional gender discrimination – could bring a cause of action because she was "clearly a member of that class for whose special benefit [Title IX] was enacted," *id.* at 694. Nothing in *Cannon*, or in any other Title IX case, suggests that Congress cast a wider net. To the contrary, there can be little question that the "special class" for whose benefit Title IX was enacted comprises those individuals – typically women – who suffer direct gender discrimination. One simply cannot read Title IX's legislative history and come away with any other conclusion. Again, from the entire legislative record, Jackson has mustered only five anecdotal references (in hearing testimony) that refer to retaliation at all. *See supra* at 14-15. Notably, only two of those can even arguably be construed to touch on retaliation for complaints about discrimination against others. *See Discrimination Against Women: Hearings Before the Special Subcomm. on Education of the House Comm. on Educ. & Labor*, 91st Cong., 2d Sess. 242, 302 (1970). In contrast to that void, the legislative history is littered with references to "discrimination against women," *e.g.*, 118 Cong. Rec. 5804, 5807, 5809, in the form of "differential treatment" and "disparit[ies]" in virtually every aspect of education, *e.g.*, 118 Cong. Rec. 5804, 5805, 5807; 117 Cong. Rec. 30407. *Cf. also* Women & Families Br. 11 ("Women [a]re at a [h]eightened [r]isk of [r]etaliation ...."), 12 ("[W]omen complaining of sex discrimination are all too frequent targets of retaliatory actions ....").

Accordingly, Jackson would have the Court go two steps beyond *Cannon*: first, by expanding the scope of Title IX's implied right of action from core discrimination to include retaliation claims, as well; and then, even assuming a retaliation cause of action generally, by extending the class

of plaintiffs who may sue on that cause of action beyond direct victims who are Title IX's "unmistakable focus." *Cannon*, 441 U.S. at 691. Jackson has offered no compelling basis for taking either step, let alone both.

CONCLUSION

We close with a practical point. Over the years, Congress has proven itself fully capable of legislatively overruling interpretations of Title IX with which it disagrees. In *Grove City College v. Bell*, 465 U.S. 555 (1984), for instance, this Court held that that Title IX was "program-specific" – *i.e.*, that the receipt of grants by some students at a federally-funded college did not trigger institution-wide coverage under Title IX, but, instead, imposed Title IX obligations only on the financial aid program. *Id.* at 573-74. Believing that *Grove City* too narrowly construed Title IX, Congress promptly passed, over a presidential veto, the Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, §3(a), 102 Stat. 28 (1988), which reinstated a rule of institution-wide application for Title IX. *Cf. also* 42 U.S.C. §2000d-7 (abrogating state immunity for Title IX actions in response to *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985)).

Ordinarily, of course, Congress' demonstrated ability to respond to a particular statute's judicial interpretation might not cut decisively in either direction; whatever this Court's decision, the argument would go, Congress can step in to "fix" it. But here, for all of the reasons explained in Part I, the burden was on Jackson to show that Congress actually, affirmatively intended to create a private remedy for retaliation. He has not done so. Given the prevailing presumption against implying private rights of action and the clear-statement rule that applies to Title IX as a Spending Clause statute, the more prudent course now is for this Court to proceed with caution and to decline to create a cause of action that Congress did not. In staying its hand, the Court will put the ball back where it belongs – in Congress' court.

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

Troy King
Attorney General

Kevin C. Newsom
Solicitor General
Counsel of Record

STATE OF ALABAMA
Office of the Attorney General
11 South Union Street
Montgomery, AL 36130-0152
(334) 242-7401

(Additional counsel for *amici curiae* are listed inside the front cover.)

October 7, 2004